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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1179

JOHN RICHARD BURRUP and JAY MELVIN BURRUP,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

WILLIAM HURT ERICKSON
2345 First National Bank Bldg.
Denver, Colorado 80202
Attorney for Petitioners

Of Counsel:
HINDRY, ERICKSON & MEYER

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The Petitioners pray that a Writ of Certiorari issue to review the judgment of the Tenth Circuit Court of Appeals of the United States which affirmed the judgment of the United States District Court for the District of Wyoming, convicting the Petitioners of violations of 15 U.S.C. § 77q(a) (1964) and with having engaged in a conspiracy to violate § 77q(a) in violation of 18 U.S.C. § 371 (1964).

OPINION BELOW

The opinion in the Tenth Circuit Court of Appeals has not been reported in the Federal Reporter. A copy of the opinion is appended to this Petition (Appendix "A").

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on January 13, 1967. Rehearing was denied on February 20, 1967. The jursidiction of this Court is invoked under 28 U.S.C. § 1254 (1964).

The time for filing this Petition expires on March 22, 1967. This Petition for a Writ of Certiorari is filed within that time.

QUESTIONS PRESENTED

I.

The Petitioners were charged in an Eleven-Count Indictment with committing fraud and conspiring to commit fraud in the sale of securities in violation of 15 U.S.C. § 77q(a) (1964) and 18 U.S.C. § 371. The trial of the charges lodged against the Petitioners required three entire days. A total of twenty-five witnesses were called before the jury and testified. Eighty-three exhibits were admitted into evidence. Because of the complexity of the case and the voluminous record in the court below, the Government utilized a summary witness. This witness, aided by over-sized charts and other exhibits, summarized the evidence produced by the prosecution in support of its case. The instructions to the jury required approximately one hour. Approximately four hours after the jury retired, the court, without any indication from the jury as to the

progress of their deliberations, assumed that the jury was "having a little difficulty reaching an agreement" and recalled the jury to the courtroom. Without inquiring as to the progress of their deliberations, the court rendered the Allen Instruction. After receiving additional Instructions concerning fraud, conspiracy, and circumstantial evidence, the jury, armed by the court with the Allen Instruction, retired. Forty-eight minutes after the Allen Instruction, the jury convicted the Petitioners on all counts.

Therefore, the question is: Whether, following an extended and complex criminal trial involving fraud and conspiracy to commit fraud in the sale of securities, 15 U.S.C. § 77q(a), 18 U.S.C. § 371 (1964), an Allen Instruction, given *sua sponte* a short time after the jury commenced its deliberations, denied the Petitioners their right to a jury trial as guaranteed by Art. III, § 2 of the Constitution of the United States.

II.

The Allen Instruction was recognized by this Court in 1896 in *Allen* v. *United States,* 164 U.S. 492. Inherent in the Allen Instruction is its tendency to coerce and to inject external pressure into the deliberations of the jury. Art. III, § 2 of the Constitution of the United States guarantees to every person charged with crime in a federal court the right to a trial by jury. Implicit in the right to a jury trial is the unyielding principle that the verdict shall be the result of conscientious deliberations conducted in an atmosphere free from external pressure and coercive influences. The Allen Instruction, because of its inherent coercive tendencies, is contradictory to the guarantee of a trial by jury. The Allen Instruction cannot continue to

exist and be compatible with the fundamental guarantee of the Constitution that a person charged with a crime in a federal court is entitled to a trial by jury.

Therefore, the question is: Does the Allen Instruction deny due process of law, as guaranteed by the Fifth Amendment, and the right to a trial by jury, as guaranteed by Art. III, § 2 of the United States Constitution, to a person charged with crime in a federal court?

III.

Since 1896, the rights and protections to be observed in criminal trials in the federal courts have been greatly expanded by this Court. *Allen* v. *United States, supra,* finds no place when compared and considered with the recent announcements of this Court developing the procedures to be followed in a federal criminal trial. *Allen* v. *United States, supra,* should be reexamined in light of the modern procedures surrounding a federal criminal trial to determine whether its use should be continued.

Therefore, the question is: Whether this Court should invoke its supervisory power over the lower federal courts and determine whether the use of the Allen Instruction should continue to be permitted in the federal courts and, if so, whether this Court should establish uniform guidelines to be followed by the federal courts in utilizing the Allen Instruction.

STATEMENT OF THE CASE

On October 26, 1964, a complex Eleven-Count Indictment, extending sixteen pages in length, was returned by the Grand Jury and filed against the Petitioners. (Tr. 2a-17) Both Petitioners were charged

with ten substantive counts of fraud in the sale of a security in violation of 15 U.S.C. § 77q(a), and with one count of conspiring together to violate 15 U.S.C. § 77q(a) in violation of 18 U.S.C. § 371. To these charges, the Petitioners entered pleas of not guilty.

The security which formed the basis of the charges lodged against these Petitioners was not ordinary stock, but was an option to purchase stock in the Pacific Atlantic Life Insurance Company.

The so-called charging count of the Indictment included an allegation that the Petitioners made a total of sixteen separate and distinct untrue and misleading statements of material fact concerning this option to purchase stock to some, one, or all of the persons named in the subsequent counts. (Tr. 4-6) This same count alleged that the Petitioners failed to state at least ten material facts which they knew to exist and which were necessary in order to make the statements made by them, in the light of the circumstances under which they were made, not misleading to the count witnesses who were named in the Indictment. (Tr. 6-7)

The final count, Count Eleven, contained the allegation of conspiracy, confederation, and combination between the Petitioners to violate § 77q(a). (Tr. 13-17) In designating the overt acts establishing this conspiracy, in addition to the acts alleged in the previous ten counts, the conspiracy charge enumerated fifteen separate and distinct acts done in furtherance and pursuance of the alleged conspiracy.

The trial of the Petitioners extended three entire days, commencing April 13, 1965, and concluding on April 15th. Presentation of the evidence required two

complete days. The evidence on behalf of the United States required one complete trial day and approximately half of the second. A total of twenty-five witnesses gave testimony before the jury. Seventeen witnesses were called by the United States, which included eleven count witnesses and an expert accountant employed by the Securities and Exchange Commission. This witness was aided by complex demonstrative charts. He utilized his summaries of cash statements which related to certain bank accounts held by the Petitioners and transfer records of stock purchase options, and summarized the evidence adduced by the United States in support of its charges against the Petitioners. Six witnesses were called on behalf of the defense. Both Petitioners testified in their own behalf.

Eighty-three exhibits were admitted into evidence. Seventy-six exhibits were admitted by the trial court on behalf of the United States. The Petitioners offered seven.

The jury was presented with a mass of evidence, both testimonial and documentary, to apply to criminal charges of a sophisticated and exceedingly complex nature. With their deliberations having progressed only three hours and fifty-three minutes, with no indication that the jury was deadlocked in their deliberations, the trial court recalled them to the court, surmised that they were "having a little difficulty in reaching an agreement" (Tr. 324), and rendered the Allen Instruction. After requesting and being given further Instructions on the legally sophisticated concepts of fraud, conspiracy, and circumstantial evidence, the jury retired. Forty-eight minutes later, they returned with convictions of the Petitioners on all counts.

The First Day

On the first day of the trial, subsequent to the selection of the jury and the opening statements of both counsel for the United States and the Petitioners, the United States commenced its presentation of the evidence in support of its charges. (Tr. 26-66) Two witnesses testified (Tr. 66-70), and ten exhibits were received into evidence. Exhibits 5, 6, and 7, consisting of detailed annual financial statements of the Pacific Atlantic Life Insurance Company, were admitted. The presentation of the evidence on behalf of the United States continued into the afternoon.

During the afternoon, the testimony of thirteen witnesses was heard by the jury. Forty-six exhibits were received into evidence. One of the documents admitted was Exhibit 66 (Tr. 85), which consisted of the stock transfer ledger of the Pacific Atlantic Life Insurance Company.

The Second Day

The evidence in support of the charges against the Petitioners continued to be presented by the United States. Three witnesses were called to testify. Mr. John Wassberg, an expert in the field of accounting, who was employed by the Securities and Exchange Commission (Tr. 156), was called by the United States to summarize the voluminous and complex evidence previously displayed to the jury. Exhibits 68, 69, 70, and 71 were admitted into evidence as an aid in this summarization. Exhibits 68 and 69 were summaries of cash statements of bank accounts which were held by the Petitioners in certain banks in Wyoming. (Tr. 163) Exhibits 70 and 71 were large charts which the accountant used to trace the transfer of options to

purchase stock from the Petitioners to various individuals, including the witnesses named in the various counts of the Indictment and other transferees. These charts were prepared and used by the prosecution's accountant to summarize the Government's complex evidence and to conclude the prosecution's case against the Petitioners. (Tr. 155-165)

A motion for judgment of acquittal was thereafter made by both Petitioners and denied. The defense case was also completed on the second day. (Tr. 168-169) Eight witnesses, including the Petitioners, were called and testified. Seven exhibits were received into evidence. At this point, the Petitioners rested their case, and the United States offered no rebuttal evidence.

The Third Day

Following the summation of both counsel for Petitioners and the United States, the jury was instructed at length with respect to the law applicable to the case. (Tr. 309-323) According to the trial court's own estimate, "fifty minutes" were required to fully instruct the jury. (Tr. 327).

Following the noon recess, at 1:12 P.M., the jury commenced its deliberations. In order to make these deliberations more meaningful, the jury was given the Indictment, as well as all of the exhibits which were admitted into evidence. (Tr. 324 and selected portions of the trial transcript, Page 356, hereinafter referred to as SP)

At 5:05 P.M., three hours and fifty-three minutes after the case was submitted, the trial court, *sua sponte*, called the jury into open court. No indication existed that the jury was deadlocked, and nothing occurred

that would justify the interruption of the jury's deliberation. (Tr. 324, SP 536) Without inquiry concerning the state of their deliberations, the court, upon its assumption that the jury was "having a little difficulty reaching an agreement" (Tr. 324), administered the "Allen Instruction" in the following form:

> "The Court: Members of the jury, a Court can never ask a jury how you stand. This is reversible error. So a judge has to be very careful on these occasions as to what he says and not to invite any questions from the jury that might do what I have warned you throughout all these proceedings we don't want to do, which is to cause error, that the case might have to be tried again.
>
> I have an instruction here which the Supreme Court of the United States has approved, and the Court of Appeals, which is the court between this Court and the Supreme Court of the United States. It sometimes is helpful to a jury when you are having a little difficulty in agreeing, and I take it that, now that you have been out four hours, that you were having a little difficulty reaching an agreement.
>
> The verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, not a mere acquiescence in the conclusions of his fellows.
>
> In order to bring twelve minds to a unanimous result, the jury must consider the questions submitted to them with candor and a proper regard to the opinions of each other.
>
> You must consider that the case must at some time be decided.
>
> You have been selected in the same manner and from the same source that a future jury must be selected. There is no reason to suppose that the case would ever be submitted to twelve men and

women more intelligent, more impartial or more competent to decide it, or that more clear evidence would be produced on one side or the other.

With this view in mind, it is the duty of the jury to decide the case, if you can conscientiously do so; that in conferring together, you should pay proper respect to each other's opinions and listen, with a disposition to be convinced, to each other's arguments. If the larger number of the panel are for acquittal, a dissenting juror should listen to the arguments of the majority. He or they should consider whether his reasoning is sound as against arguments of the other men or women equally honest, equally intelligent with himself, and who heard the same evidence with the same attention and with an equal desire to arrive at the truth.

On the other hand, if a majority are for conviction, the minority should seriously ask themselves whether they should not reasonably doubt the correctness of their decision which is not concurred in by most of those with whom you are associated along the lines I have hereinbefore mentioned."

Subsequent to the Allen Instruction, the court inquired of the jury as to whether there were any Instructions that they did not "particularly understand." (Tr. 325) The jury requested that the Instructions on fraud, conspiracy, and circumstantial evidence be repeated.

Exposed to the Allen Instruction, the jury retired at 5:37 P.M. (Tr. 330, SP 545) Forty-eight minutes later, the jury returned a verdict of guilty on all counts against both Petitioners.

The court below affirmed the judgments of conviction of both Petitioners. Petition for Rehearing was denied.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

The decision in the instant case conflicts in principle with the decisions which limit the giving of an Allen Instruction. The Allen Instruction forces a jury whose deliberations have reached the point of deadlock to deliberate further for the purpose of reaching agreement. The Allen Instruction provides a judge with a pressure instruction, which forces a jury to reach an early verdict over the objection of the dissenting members of the jury. Coercion and pressure are absolutely foreign to jury deliberations, because free deliberations are rendered impossible. Because the Allen Instruction is fundamentally coercive, it should not be given, except when the jury is hopelessly deadlocked. *United States* v. *Rogers,* 289 F. 2d 433 (4th Cir. 1961); *Huffman* v. *United States,* 297 F. 2d 754 (5th Cir. 1962), *cert. den.* 370 U.S. 955 (1962); *Andrews* v. *United States,* 309 F. 2d 127 (5th Cir. 1962); *Green* v. *United States,* 309 F. 2d 852 (5th Cir. 1962); *United States* v. *Kahaner,* 317 F. 2d 459 (2nd Cir. 1963), *cert. den.* 375 U.S. 835 (1963).

The decision below stands in direct contradiction to this principle. It permits the trial courts to render the Allen Instruction at any time, irrespective of the stage at which the deliberations of the jury stand. The thrust of the decision below is best exemplified by the concurring remarks of Judge Phillips:

> "The majority opinion contains expressions to the effect that an instruction phrased essentially like the so-called Allen Instruction, given either before the case is submitted to the jury, or before the jury has indicated its ability to agree on a verdict, is less coercive than such an instruction

would be if given after the jury has so indicated. I accept that statement as settled law in this circuit."

Standing alone, the decision below permits the instruction to be given at any time during the course of a jury's deliberations and does not limit the giving of the Allen Instruction to a time when the jury is deadlocked. *Compare, United States* v. *Meisch,* — F. 2d — (3rd Cir., Dec. 30, 1966), see, Vol. 3, No. 1, Crim. Law Bull. (Jan.-Feb. 1967). Accepting *arguendo* the Allen Instruction, its use should be limited to the point in time that justifies its acceptance in the first instance. That time is the point at which an impasse is reached. Certiorari should be granted to bring the law of the Tenth Circuit into conformity with that prevailing throughout the federal courts.

II.

The question presented by this Petition is of great importance to the administration of criminal justice in the federal courts.

Art. III, § 2 of the United States Constitution guarantees to every person charged with crime in the United States Courts the right to a trial by jury. Implicit in that basic and fundamental right is the unyielding principle that the verdict reached by the jury shall be the independent product of each and every juror's judgment, reached after conscientious, uncoerced, and unpressured deliberations. A verdict resulting from pressure and external influence does not comport with Art. III, § 2 of the United States Constitution.

External pressure has no place in the deliberations of a jury which has undertaken to determine the guilt

or innocence of a person charged with a serious crime. The Instruction and its effect gains added significance, because it is the trial judge speaking. Without doubt, when pressure emanating from the Allen Instruction stems from the trial judge, its tendency to coerce is magnified beyond degree.

The coercive element of the Allen Instruction injects into the deliberations of the jury an unnecessary prejudicial factor. The Allen Instruction finds no place in the administration of criminal justice in the federal courts. Its acceptance by the federal courts stems from this Court's approval of the Instruction in *Allen* v. *United States,* 164 U.S. 492 (1896). As was stated in *Green* v. *United States,* 309 F. 2d 852 (5th Cir. 1962), "There is small, if any, justification for its use." (Id. at 854)

With regard to the development of the law and administration of criminal justice since that date, the remarks of Judge Wisdom are apposite. In *Huffman* v. *United States,* 297 F. 2d 852 (5th Cir. 1962), he stated:

> "The fact is that in many phases of criminal law we have come a long, long way since 1896. There is no longer any place for the Allen charge. For good reasons it has acquired its descriptive as the 'dynamite charge' (variously called the 'nitroglycerin charge') at the hands of the Bar. This is an intrusion by the Judge into the exclusive domain of fact finding by the jury. It is nonetheless so merely because the Judge does not indicate which of two decisions must be reached.
>
> "What is worse, it is becoming more and more commonplace. Nearly every hard-fought criminal case coming to this Court reveals the Judge sooner or later giving this charge or some embellishment

of it. Too often, as in these two cases, it was but a matter of a few hours after the jury had retired to deliberate. . . .

"I think a mistrial from a hung jury is a safeguard to liberty. In many areas it is the sole means by which one or a few may stand out against an overwhelming contemporary public sentiment. Nothing should interfere with its exercise. In the final analysis the Allen charge itself does not make sense. All it may rightfully say is that there is a duty to consider the views of others but that a conscientious person has finally the right and duty to stand by conscience. If it says that and nothing more it is a superfluous lecture in citizenship. If it says more to declare that there is a duty to *decide,* it is legally incorrect as an interference with that rightful independence.

"The time has come, I think, to forbid this practice. Like the silver platter, this is too dear to keep. The cost in fundamental fairness is too great."

The approval of this Court given to the Instruction in *Allen* v. *United States, supra,* requires re-examination by this Court in light of the developments enunciated by this Court with regard to the rights of the criminal defendant before the federal courts. The jury is the safeguard of liberty and the vanguard of freedom. It is the basic protection of the citizen against oppression. Any inroad upon it, be it judicial or otherwise, must be scrutinized by this Court with great care, lest the freedom which it protects be destroyed. In *Beacon Theaters, Inc.* v. *Westover,* 359 U.S. 500 (1959), this Court, dealing with the civil jury, commented that the maintenance of the jury is of such importance and occupies such a firm place in history and jurisprudence that, ". . . any seeming curtailment of the right to a

jury trial should be scrutinized with utmost care." The Allen Instruction, because it injects the element of coercion into the jury's deliberations, which by definition must be uncoerced and free, conflicts with the guarantee set forth in Art. III, § 2 of the United States Constitution. Its use should no longer be permitted. It should find no place in modern American criminal jurisprudence.

The question presented in the instant case transcends the rights of these Petitioners and affects each and every person charged with crime in a federal court. Because of *Allen* v. *United States, supra,* the Allen Instruction is uniformly accepted in the federal courts. It is generally accepted by the state courts. See *Comment, Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge,"* 31 U. CHI. L. REV. 386 (1964). Resolution of the question regarding the propriety of the Allen Instruction will bring uniformity to an area of the law where it is most needed.

This Court is inherently vested with an administrative and supervisory control concerning the practice and procedure followed in the lower federal courts. *McNabb* v. *United States,* 318 U.S. 332 (1943); *Mallory* v. *United States,* 354 U.S. 449 (1957).

The procedures surrounding a federal criminal trial and the protections afforded to the criminal defendant have been greatly expanded by this Court. The Allen Instruction is incompatible with the rights of the criminal defendant and the modern procedural safeguards established for a federal criminal trial. The 1896 decision of *Allen* v. *United States, supra,* should be re-examined in light of modern criminal procedure to determine whether the Allen Instruction should con-

tinue to find acceptance in the federal courts. The decision below vests within the trial court's unfettered discretion the time and the circumstances under which the Allen Instruction could be appropriately given. (See the remarks of Judge Phillips, concurring, *supra.*) The court approves of the Instruction when given as part of the general charge. *Compare, Carter* v. *United States,* 333 F. 2d 354 (10th Cir. 1964), and *Nick* v. *United States,* 112 F. 2d 660 (8th Cir. 1941), with *United States* v. *Meisch, supra,* and *Green* v. *United States, supra.* It likewise approves of the Instruction given while the jury is still in the course of conscientious and good faith deliberations. The accepted standard in this regard permits the Allen Instruction only when given at the point in time when it can be said that the jury has reached an impasse in their discussions.

Uniformity of procedure is essential regarding the Allen Instruction. It is suggested that this Court exercise its supervisory and administrative power to establish uniform standards and guidelines to be followed by the lower federal courts in giving the Allen Instruction.

III.

Certiorari has been granted in *Grosso* v. *United States,* 385 U.S. 810, No. 181 (1966). While not directly concerned with the Allen Instruction itself, the question there presented is analagous to that presented in the instant case. There, after the jury had indicated to the court in unequivocal terms that its deliberations had reached the stage of deadlock, the Court directed that their deliberations continue. Five hours thereafter, the jury returned a verdict convicting the de-

fendant. The Court of Appeals for the Third Circuit determined, as did the court below in the instant case, that, under the circumstances presented, the verdict did not appear to be the product of coerced deliberations.

Certiorari should be granted in the instant case, so that the issues raised in both cases concerning the coercion of a jury in its deliberations may be fully and completely considered by this Court.

IV.

The decision below is erroneous. The Petitioners are guaranteed the right to a trial by jury, set forth in Art. III, § 2 of the United States Constitution. Implicit in this right to trial by jury is the principle that the deliberations and discussions of the jury shall be conducted in an atmosphere free from any external coercive influences.

The facts underlying the verdict of the jury reached in the instant case render it beyond doubt that the verdict was not the conscientiously-arrived-at conclusion of each individual juror. Rather, it was the product of coercion and influence that found its source in the Allen Instruction. Forty-eight minutes between the Allen Instruction and the verdict reached in this case negates any conclusion that there were further uncoerced deliberations.

The statute under which the Petitioners were charged is difficult to understand, even for those trained in the law. Because of its inherent complexity, much time was necessary before the jury, composed of laymen, could attempt to understand its meaning and apply it to the massive and complex record that was submitted

for their consideration. Added to the inherent complexity of 15 U.S.C. § 77q(a), the jury was also called upon to consider the nebulous concept of conspiracy condemned in 18 U.S.C. § 371.

The Indictment, sixteen pages in length, is but further illustration of the complexity of this case. The security in question was not ordinary stock in a corporation, but was an option to purchase stock. A substantial amount of the testimony concerned itself with the question of whether or not the investor-witnesses knew or were told that they were purchasing stock or an option to purchase stock. While a security under the statutory definition, an option to purchase stock is not a security as that term is ordinarily understood by the average layman.

Each transaction charged in the Indictment was unrelated to the other. Separate bodies of evidence were presented to substantiate each change.

The evidence offered by the United States in support of its charge was voluminous and required two complete trial days to present. A total of twenty-five witnesses gave testimony before the jury. Eighty-three exhibits were received into evidence. Because the case was of such complex nature, the United States considered it essential to an understanding of its case to utilize a summary witness to synthesize and summarize the evidence adduced. Complexity was the hallmark of this case.

The jury was permitted by the court to deliberate a scant three hours and fifty-three minutes when, *sua sponte,* and without any indication whatsoever that the jury was finding it difficult to agree, the court assumed that such was the fact and recalled the jury. Without

inquiry as to the progress of their deliberations, the court administered the coercive Allen Instruction. Then, additional Instructions concerning fraud, conspiracy, and circumstantial evidence were given at the request of the jury. Totally absent from this period of supplemental instruction was any mention of the requirement that the United States has the burden of proving its charges against the Petitioners and that they were to be presumed innocent until this burden was satisfied beyond a reasonable doubt. See, *Berger* v. *United States,* 62 F. 2d 438 (10th Cir. 1932). A mere forty-eight minutes elapsed, and the jury convicted the Petitioners.

Deliberations ceased upon the application of the Allen Instruction. Three hours and fifty-three minutes was an insufficient period of time to warrant the conclusion that the deliberations of the jury had reached a stage of immobility that warranted the Allen Instruction. Moreover, a stage of deadlock could not have been reasonably inferred, because the jury requested further instruction regarding fraud, conspiracy, and circumstantial evidence. This jury was still in the course of deliberation. The Petitioners were deprived of their right to a jury trial when the court, upon its erroneous conclusion that the jury was having "a little difficulty reaching agreement," exerted the influence of the Allen Instruction.

The principle that should govern the Allen Instruction in this case is aptly set forth in 8 Moore, Federal Practice and Procedure, ¶ 31.04 at 31-8 (1965):

> "Inevitably the strength of the suggestion to continue deliberations must depend upon the complexity of the case. Where evidence is quantitatively great and issues difficult, it may be assumed

> that many hours will be required for deliberations to reach a state of refinement where jurors know they are truly deadlocked."

The Petitioners were guaranteed by Art. III, § 2 of the United States Constitution the right to a verdict that reflects the independent views of each jury impaneled to try the case. The verdict was subjected to the pressure and coercion of the Allen Instruction. The verdict is contrary to Art. III, § 2 of the United States Constitution. The convictions of the Petitioners cannot stand.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM HURT ERICKSON
2345 First National Bank Bldg.
Denver, Colorado 80202
Attorney for Petitioners

Of Counsel:
HINDRY, ERICKSON & MEYER

March, 1967

APPENDIX

APPENDIX "A"

[Opinion of the Lower Court and Judgment]

Filed January 13, 1967

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November Term 1966

Nos. 8507, 8508

JOHN RICHARD BURRUP and JAY MELVIN BURRUP, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appeal From the United States District Court for the District of Wyoming

William Erickson (of the firm of Hindry, Erickson & Meyer, and the firm of Hickey, Rooney & Walton with him on brief) for Appellants.

Leroy V. Amen (Robert N. Chaffin, United States Attorney, with him on brief) for Appellee.

Before MURRAH, Chief Judge, PHILLIPS and PICKETT, Circuit Judges.

MURRAH, *Chief Judge*

In this criminal appeal the appellants complain for the first time of the trial court's so-called "Allen" instruction to the jury. In the tenor and context in which it was given we do not think the charge was improper. Complaint is also made of the supplemental instructions on fraud, conspiracy and circumstantial evidence. We find no fault with the propriety or correctness of these instructions, and we affirm the judgment.

The pertinent facts are that about four hours after submission[1], the court voluntarily recalled the jury, and after cautioning them not to disclose how they stood on guilt or innocence, observed they were apparently having a "little difficulty reaching an agreement". The judge then proceeded to give a mild version of the so-called Allen charge, prefaced by the admonition that "The verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, not a mere acquiescence in the conclusions of his fellows." At the conclusion of the charge, the foreman of the jury was asked if there were any instructions the jury did not particularly understand. When he answered affirmatively, the jury was told to retire and write out the instructions they wished to have explained. The jury returned with the written request for definitions on fraud, conspiracy and circumstantial evidence. The judge then proceeded to responsively reinstruct on each of these subjects. When the jury was asked if "these instructions help you any", the foreman answered affirmatively, and the court inquired whether they wanted all of the other instructions read by the reporter. The foreman answered negatively. After some further instructions concerning the form of the verdict, the jury returned to its deliberations. Out of the presence of the jury the court inquired if there were any objections or suggestions, and counsel for appellants objected to the giving of " * * * the extra instructions for the reason that, taken out of context, without considering the rest of the instructions, it may be that they did not fully and properly explain the elements of conspiracy or of what fraud is and circumstantial evidence. And I particularly direct attention to the fact that the very last instruction of the Court with reference to circumstantial evidence given originally to to jury was not now given to them, just for the record,

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[1] The indictment contained eleven counts, ten charging violations of the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. 77(q)(a), and the other charging a conspiracy to violate the provisions of the same Act.

so we will have it." No objection was made to the Allen instruction, but since it affects the judge-jury relationship and " * * * cannot be effectively remedied by modification of the judge's charge after the harm has been done", we will take note of it here. Berger v. United States, 62 F. 2d 438, quoting from Brasfield v. United States, 272 U.S. 448; and see Burroughs v. United States, 365 F. 2d 431.

Appellants freely concede this court's repeated approval of the Allen instruction to an apparently deadlocked jury, provided the jury is given to understand they are not required to give up their conscientiously held convictions. But, the contention here is that since the instruction was given before the jury had a reasonable opportunity to deliberate or disagree, it was coercive. We have expressed the view that an instruction of this kind is less likely to be coercive if given before the jury has indicated its inability to agree on a verdict; that in this posture of the jury's deliberations, it is intended and has the effect of inducing the jury to reason together toward a collective judgment. See Carter v. United States, 333 F. 2d 354; Donald R. Elbel v. United States, 364 F. 2d 127. We have only recently re-emphasized the " * * * function of the judge to admonish the jury that they should deliberate together in an atmosphere of mutual deference and respect giving due consideration to the views of the others in the knowledge that in the end their verdict must reflect the composite views of all." And, we have suggested that "An admonitory statement in this tenor given before the jury retires to deliberate would be more appropriately influential and far less vulnerable to the charge of coercion." Burroughs v. United States, supra.

Viewed in the context in which the jury was recalled and reinstructed, it is apparent that the judge was apprehensive concerning whether the jury fully understood the legalistic instructions of the law applicable to the case. Indeed, his apprehension was justified by the jury's response to his inquiry.

In Berger v. United States, supra, we held it reversible error to give an Allen charge without again calling "* * * the jury's attention to the presumption of innocence, the burden of proof, and the requirement that guilt must be established beyond a reasonable doubt * * *" and without stating "* * * the duty of each juror to perform his duty honestly and conscientiously according to the law and the evidence, and not to surrender his conscientious convictions." Id. 440. The trial judge did not re-emphasize the presumption of innocence and the burden of proof beyond a reasonable doubt, and we have not taken notice of the failure to so instruct in subsequent cases. We do readily agree, however, that these fundamental precepts should always be kept in the forefront of the jury's mind and that the judge cannot be too careful to remind the jury of these prerequisites to full and fair consideration of the guilt or innocence of an accused. But, in the circumstances of this case we do not think it was error to fail to reiterate what the court had already made manifestly plain in its original instructions.

Inasmuch as the court's supplemental instructions on fraud, conspiracy and circumstantial evidence were given in response to the jury's specific inquiry and for the purpose of clarifying legalistic terms to a lay jury, no valid complaint can be made of their propriety. It is not suggested in what respect they were incorrect statements of the law. Indeed, we have examined them with care and find them to be commendably clear and succinct.

The judgment is affirmed.

PHILLIPS, Circuit Judge, concurring:

My concurrence is in the result only, for the reasons I shall undertake to state.

The majority opinion contains expressions to the effect that an instruction phrased substantially like the so-called Allen instruction, give either before the case is submitted to the jury, or before the jury has indicated its inability to agree on a verdict, is less coercive than such an instruc-

tion would be if given after the jury has so indicated. I accept that statement as settled law in this circuit.

However, it is my opinion that the so-called Allen instruction should not be given, except and until there has been an indication that the jury is finding it difficult to agree on a verdict, and then only when the court believes the existing circumstances warrant the giving of such instruction.

I know from trial court experience that the Allen instruction, when given, usually induces quick agreement on a verdict by the jury. However its language may be safeguarded to leave each juror free to exercise his independent judgment, there will be instances when it will cause a juror to surrender unwillingly his sincere and deliberately arrived at convictions of what the verdict should be, and thus defeat the purpose of the constitutional requirement of a unanimous verdict in federal trial courts. Therein lies its danger.

Hence it is my opinion that the instruction should be used sparingly by the trial judge and only after there has been an indication that the jury is finding it difficult to agree, and where the judge in the exercise of a sound discretion believes the circumstances warrant the giving of such an instruction.

Accordingly, it is my view that such an instruction should not be given, either before the case has been submitted to the jury or before there has been an indication that the jury is finding it difficult to agree, in contemplation that a situation may develop where it would be appropriate to give it.

But, on the record here presented, while to me the case seems to be close to the border line, I cannot say the trial court could not have concluded the jury was having difficulty in agreeing on a verdict and that the circumstances were such as to warrant the giving of the challenged instruction in the carefully guarded language in which it was couched.

Judgments

No. 8507

Ninth Day, January Term, Friday, January 13th, 1967.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that John Richard Burrup, appellant, surrender himself to the custody of the United States Marshal for the District of Wyoming, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

No. 8508

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Jan Melvin Burrup, appellant, surrender himself to the custody of the United States Marshal for the District of Wyoming, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1179

JOHN RICHARD BURRUP and JAY MELVIN BURRUP,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted in the United States District Court for the District of Wyoming on ten counts of an indictment charging securities fraud in violation of 15 U.S.C. 77q(a), and on one count charging conspiracy to violate 15 U.S.C. 77 q(a). On June 4, 1965, each was sentenced to two years' imprisonment on each of the eleven counts, the sentences

to run concurrently (Tr. 23, 24).[1] The court of appeals affirmed (Pet. App. 1-5).

The indictment alleged, and the government's evidence (the sufficiency of which is not challenged) established, that petitioners, using the mails in furtherance of the scheme, fraudulently induced the purchase of options (at $5 to $7 per option) to buy common stock in the Pacific-Atlantic Life Insurance Company. The company had been co-founded in 1959 by petitioner Jay Burrup, and petitioner John Burrup was employed as a company salesman (Tr. 169, 205-206. The representations used to induce the sales were, *inter alia*, that Pacific-Atlantic common stock was being offered for sale (when, in truth, the purchasers were being offered options to buy such stock, and the exercise of the options would cost an additional $5 per share of stock); that the proceeds from these sales would be invested directly in Pacific-Atlantic (when in fact, the proceeds were intended to be, and actually were, deposited in petitioners' personal accounts); and that the company was realizing profits and paying substantial dividends (when, in truth, during the first four years of its existence, including the period when these promotional claims were being made, the company had realized no profits and paid no dividends). See *e.g.*, Tr. 75-76, 92, 97, 98-99, 101, 108-109, 148-151.

Petitioner Jay Burrup, in his own defense, testified that the stock options were merely pledged as col-

[1] "Tr." designates the transcript of record on file with the Clerk of this Court.

lateral for personal loans from the alleged victims (*e.g.*, Tr. 180-181), and that he did not know that his brother was selling stock options (Tr. 181). Petitioner John Burrup admitted making the sales, but denied making any misrepresentations (*e.g.*, Tr. 212-214).

2. The government took less than two days to present its case, and, at 1:12 p.m. of the third day, the case was submitted to the jury (Tr. 323-324). Some four hours later, the court, noting that the jury was apparently having a "little difficulty reaching an agreement" (Tr. 324), recalled the jury and, without inquiring into how they stood, gave a version of the *Allen* instruction. See *Allen* v. *United States*, 164 U.S. 492.[2] The defense made no objection to this in-

[2] The court charged (Tr. 324-325):

The Court: Members of the jury, a Court can never ask a jury how you stand. That is reversible error. So a judge has to be very careful on these occasions as to what he says and not to invite any questions from the jury that might do what I have warned you throughout all these proceedings we don't want to do, which is to cause error, that the case might have to be tried again.

I have an instruction here which the Supreme Court of the United States has approved, and the Court of Appeals, which is the court between this Court and the Supreme Court of the United States. It sometimes is helpful to a jury when you are having a little difficulty in agreeing, and I take it that, now that you have been out four hours, you are having a little difficulty reaching an agreement.

The verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, not a mere acquiescence in the conclusions of his fellows.

In order to bring twelve minds to a unanimous result, the jury must consider the questions submitted to them with

struction. The court then asked the jury foreman if there were any of the original instructions that the jury did not understand (Tr. 325). The foreman indicated that there was some confusion, and the jury was thereafter reinstructed as to matters on which it evinced a desire for clarification (*i.e.*, the elements of conspiracy and fraud, and the nature of circumstantial evidence) (Tr. 326-329). The defense noted an objection to these particular supplemental instructions.

Having failed to object at trial to the version of the *Allen* charge given by the trial judge—although

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candor and a proper regard to the opinions of each other.

You must consider that the case must at sometime be decided.

You have been selected in the same manner and from the same source that future jury must be selected. There is no reason to suppose that the case would ever be submitted to twelve men and women more intelligent, more impartial or more competent to decide it, or that more clear evidence would be produced on one side or the other.

With this view in mind, it is the duty of the jury to decide the case, if you can conscientiously do so; that in conferring together, you should pay proper respect to each other's opinions and listen, with a disposition to be convinced, to each other's arguments. If the larger number of the panel are for acquittal, a dissenting juror should listen to the arguments of the majority. He or they should consider whether his reasoning is sound as against arguments of the other men and women equally honest, equally intelligent with himself, and who heard the same evidence with the same attention and with an equal desire to arrive at the truth.

On the other hand, if a majority are for conviction, the minority should seriously ask themselves whether they should not reasonably doubt the correctness of their decision which is not concurred in by most of those with whom you are associated along the lines I have hereinbefore mentioned.

specifically objecting to the other supplemental instructions—petitioner should not be heard to assert error in that charge on appeal. See *Carter* v. *United States*, 333 F. 2d 354, 357 (C.A. 10); Rule 30, F.R. Cr. P. In any event, there is no occasion for further review. The *Allen* charge was reapproved by this Court in *Lias* v. *United States*, 284 U.S. 584, and in *Tomoya Kawakita* v. *United States*, 343 U.S. 717, affirming, 190 F. 2d 506, 521-528 (C.A. 9). And the Court has, in recent years, repeatedly declined to reexamine the validity of the *Allen* charge notwithstanding contentions similar to those made here. See, *Elbel* v. *United States*, 364 F. 2d 127 (C.A. 10), certiorari denied, 385 U.S. 1014; *Estes* v. *United States*, 335 F. 2d 609 (C.A. 5), certiorari denied, 379 U.S. 964; *United States* v. *Kenner*, 354 F. 2d 780 (C.A. 2), certiorari denied, 383 U.S. 958; *Thaggard* v. *United States*, 354 F. 2d 735 (C.A. 5), certiorari denied, 383 U.S. 958; *Walker* v. *United States*, 342 F. 2d 22 (C.A. 5), certiorari denied, 382 U.S. 859. The "mild version" (see opinion of the court of appeals, Pet. App. 2) given in this case did not go beyond the permissible limits. Indeed, as the court of appeals pointed out (Pet. App. 3), the fact that the trial judge gave the instructions before the jury indicated any inability to agree lessened, rather than heightened, the danger of jury coercion resulting therefrom. See *Carter* v. *United States*, *supra*; *Elbel* v. *United States*, *supra*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

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